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Chairman: Mr. Mochochoko ..... (Lesotho)

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The meeting was called to order at 3.20 p.m.

Agenda item 158: Establishment of an international criminal court (continued) (A/54/98; PCNICC/1999/L.3/Rev.1 and L.4/Rev.1)

1. **Mr. Mekprayoonthong** (Thailand) said that, important as it was to put an end to impunity for perpetrators of the most serious crimes causing concern to the international community, the Elements of Crimes and the Rules of Procedure and Evidence being drafted by the Preparatory Commission for the International Criminal Court, would be a crucial yardstick by which his country would determine whether it was feasible for it to assume obligations under the Rome Statute of the International Criminal Court by becoming a State party thereto. His delegation urged that the Elements of Crimes should reflect, rather than depart from, contemporary international law. If shortcomings did exist, they should be rectified in such a manner as to facilitate and not to impede the rendering of international criminal justice. Above all, the June 2000 deadline for the Preparatory Commission to discharge its mandate must be observed.

2. **Mr. Hassan** (Sudan) said he welcomed the adoption of the Rome Statute as a major step forward and noted the growing trend toward resolving disputes and conflicts by means of the law, rather than by force. He continued to support the establishment of the International Criminal Court, but acknowledged that it would not be easy for the Preparatory Commission to complete its task. In that connection, the first obstacle to be overcome concerned the crime of aggression, which should be included within the jurisdiction of the Court without the conditions currently stipulated. Concerning the role of the Security Council in that regard, a satisfactory formula could be found by ensuring that the Council did not overlook any instances of blatant aggression for political reasons. As for the definition of the crime of aggression, it should be remembered that aggression was mentioned in the Charter of the United Nations, and that the General Assembly had adopted the Definition of Aggression (resolution 3314 (XXIX)), which was adequate for the purposes of international legal instruments and provided a solid foundation on which to build. He commended the decision of the Chairperson of the Preparatory Commission to establish a working group to settle the issue of including the crime of aggression within the jurisdiction of the Court without conditions; failure to do so would be to ignore the lessons of history.

3. The second obstacle to be overcome concerned the Elements of Crimes. The elaboration of those Elements was simply a means of clarifying and interpreting crimes and should not involve any amendment of the Rome Statute. The principle of ensuring that criminals did not escape with impunity for war crimes, crimes against humanity and genocide should not be applied selectively on the basis of State or nationality. His country advocated recourse to the law in all cases without exception and thus fully supported the establishment of a criminal system that would provide reassurance to the human race and dissipate its fears concerning international crimes and their consequences.

4. **Mr. Enkhsaikhan** (Mongolia) said that the Preparatory Commission had made significant progress, especially in the elaboration of the draft Rules of Procedure and Evidence and the Elements of Crimes. The importance of establishing the International Criminal Court was evident, as had been underlined by recent proceedings in the General Assembly and the Security Council, and the successful completion of the Preparatory Commission's work in the near future would further accelerate the process of signing and ratifying the Statute. The creation of a viable and credible Court would substantially enhance deterrence of the most heinous international crimes such as genocide, crimes against humanity, war crimes and crimes of aggression and would send a strong message to potential perpetrators of such crimes.

5. With regard to the Rules of Procedure and Evidence, it was important to strike a balance between the rights of victims and those of suspects and the accused, to enable justice to be carried out while protecting basic human rights. As to the Elements of Crimes, it would be desirable to clarify, as far as possible, those crimes that were not sufficiently defined in the Statute. In that context, his delegation welcomed the Commission's decision to establish a working group on crimes of aggression, which his delegation had long considered should be clearly defined and reflected in the Statute. He hoped that the working group would be able to complete the task before the deadline of June 2000. The Commission as a whole should be given the high priority that it deserved in the allocation of both time and resources. The international situation was such that the speedy creation of the Court — for which the international community had waited almost half a century — was appropriate. A third three-week session for the Commission in 2000 should therefore not be ruled out. Inter-sessional meetings should also be considered, if they were necessary.

6. The official translation of the Statute into Mongolian was near completion. The Government intended to sign the Statute in the near future and present it for consideration to Parliament. There was a good chance that the Statute would be ratified in the not too distant future.

7. **Mr. Gao Feng** (China) expressed his satisfaction with the progress achieved thus far in formulating the two essential instruments necessary for the functioning of the Court, namely the Elements of Crimes and the Rules of Procedure and Evidence, a process in which his Government had actively participated. The constructive cooperation shown by the members of the Preparatory Commission was undoubtedly conducive to the early completion of both instruments. In formulating the Elements of Crimes, the provisions of the Rome Statute concerning the crimes under the jurisdiction of the Court should be fully respected in both letter and spirit. Similarly, in accordance with the principle of *nullum crimen sin lege*, the elements which constituted crimes under the jurisdiction of the Court should be described in accurate terms. The instrument should also reflect the Court's purpose of suppressing the most serious international crimes. Only by adhering to those principles would the instrument enjoy universal acceptance. The Rules of Procedure and Evidence should be both comprehensive and flexible with a view to harmonizing different legal systems and rules, as any irrational provisions could create a serious imbalance in the rights and obligations of the parties concerned, thus running counter to the purposes of the Court.

8. He supported the establishment of a working group on the crime of aggression, which was one of the most serious international crimes. In view of the sensitive legal and political issues involved, any definition of that crime should reflect the role of the Security Council and adhere to the Charter of the United Nations. In conclusion, he supported the request to extend the time available to the Preparatory Commission in order to enable it to complete its onerous task, a process, in which his delegation would continue to play an active part.

9. **Ms. Willson** (United States of America) reaffirmed her Government's position regarding the Rome Statute, which remained unchanged since her delegation's statement contained in A/C.6/53/SR.9, paragraphs 52-63. Her Government supported the establishment of a properly constituted court that would bring to justice perpetrators of the most serious criminal violations of international law, but the Statute, as it stood, was flawed and risked undermining the goals it aimed to advance. The Court's inadequate jurisdictional safeguards — especially as applied to nationals of States that had not acceded to the Statute — might inhibit responsible international military efforts in support of humanitarian or peacekeeping objectives. For that reason, her Government could not sign the Statute, which would become a mere rhetorical milestone in international relations unless it confronted the reality of how the international system must function if peace, security and human rights were to have a lasting chance.

10. During the first two sessions of the Preparatory Commission, her delegation had held frank and useful discussions with other delegations and hoped that progress could be made. Its objective was to strengthen the Statute so as to develop a regime which her Government could embrace and for which it could provide strong diplomatic, investigative and enforcement support.

11. Her Government could not recognize the Court's competence in bringing prosecutions against United States personnel engaged in official actions, if the Government was not a party to the Statute. At the same time, her delegation was optimistic that its fundamental concerns would be addressed. With that in mind, she offered the following specific comments.

12. In the view of her delegation, which had participated actively in the negotiations on the Elements of Crimes and on the Rules of Procedure and Evidence, the seven groupings of war crimes incorporated in the rolling text of the Elements of Crimes (PCNICC/1999/WGEC/RT.4-10) were satisfactory and merited the support of all delegations. Her delegation also looked forward to any inter-sessional work that might still be arranged in respect of the elements of crimes against humanity.

13. Her delegation believed that there existed a basis for resolving differences over the war crime defined in article 8 (2) (b) (viii), namely the transfer by an Occupying Power of parts of its own population into the territory it occupied. The elements of the crime, which no one sought to amend, should reflect customary international law and the common sense of the Governments engaged in critical negotiations for lasting peace in the Middle East. Otherwise, ill-conceived elements would become a further obstacle not only to the viability of the Statute but also to the peace process. History would condemn any strategy designed to involve that crime in a political agenda. The only credible course of action was to incorporate into the elements well-known principles of international law and then articulate exceptions that were a matter of common sense and recognized in the Geneva Conventions and elsewhere.

14. The negotiations for the Rules of Procedure and Evidence had advanced considerably and there was ample experience with the International Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda that could inform the Working Group's efforts. With regard to Part 5 of the Statute, regarding investigation and prosecution, her delegation continued to feel concern about the rules pertaining to confirmation of charges. The

function of the confirmation hearing was to determine whether there was sufficient evidence to have a trial. It was not appropriate for the Pre-Trial Chamber at that preliminary hearing to review all the evidence and hear extensive witness testimony. Such a procedure could render the actual trial under Part 6 largely superfluous. The rules should require greater precision with regard to how the confirmation hearing would function and how evidence was introduced by the parties.

15. Regarding Part 6, she expressed the hope that all delegations would work hard at the next session to resolve outstanding differences regarding the rule for evidence in cases of sexual violence. She also hoped that the draft provision on privilege would gain the support of all delegations. As for provisions relating to victims, she encouraged all delegations to approach the important needs and rights of victims with common sense and the recognition that the purpose of the Court was to dispense justice. To entitle victims to intervene might adversely burden or slow down the proceedings.

16. The question of the crime of aggression should also be resolved. There were critical issues under the Charter of the United Nations that must be examined by Governments. The easier path towards an acceptable definition of aggression would have to recognize limitations imposed by the Charter, as well as practical limitations reflecting the need for the international community to respond to humanitarian and other crises without being harassed or, much worse, being charged with violations of the Statute.

17. Her Government was engaged with other Governments on issues of great importance that had to be resolved before it could consider signing the Rome Statute. There was much at stake and she solicited the Committee's support in resolving the substantial problems that remained.

18. **Mr. Korzachenko** (Ukraine) said he was pleased to inform the Committee of his Government's recent formal decision to sign the Rome Statute. He noted with satisfaction the coherent efforts undertaken within the Preparatory Commission, which had led to substantial progress in elaborating the Rules of Procedure and Evidence and the Elements of Crimes. In that connection, he stressed the importance of safeguarding the integrity of the letter and spirit of the Statute as a guiding principle of the Commission's work with a view to ensuring that neither instrument conflicted with the Statute. Nor should the strict deadline of 30 June 2000 distort the Commission's work methods, particularly during the final stages.

19. His delegation attached great importance to elaborating the definition and elements of the crime of aggression, without which the Rome Statute would be incomplete. On that score, efforts should be intensified to strike a balance between national positions and the achievement of a generally acceptable definition of the crime of aggression, which was the most serious of all international crimes. The decision to establish a working group in that connection would give additional impetus to those efforts. He reiterated his Government's commitment to the ongoing work to establish the Court and felt confident that sufficient political will would be demonstrated to enable that process to be finalized.

20. **Mr. Sergiwa** (Libyan Arab Jamahiriya) said that, despite having endured seven years of sanctions unjustly imposed on political rather than legal grounds, his country had supported the efforts to establish an international criminal court. To that end, it had participated in good faith in the work of the Preparatory Commission and was currently considering the matter of acceding to the Rome Statute. It had also organized various seminars providing an introduction to the Court and its jurisdictions. Noting that gaps in the Rome Statute had prevented its adoption by consensus, he said he had hoped that the Court would be neutral, objective and independent. Instead, however, the Security Council, a political body, was authorized to refer cases to the Court. In other words, permanent members of the Security Council would be in a position to thwart the role of the new Court by exercising their influence and using their power of veto to hinder its work.

21. He had also hoped that the interests and legitimate rights of all States would be taken into consideration in the Rome Statute. On the contrary, however, serious crimes such as drug trafficking, the use of nuclear weapons and terrorism had not been included within the Court's jurisdiction. Inclusion of the crime of aggression would depend on the formulation of an agreed definition of that crime, which should cover the widest aspects of the crime, including the many possible instances constituting violations of the laws and rules governing war.

22. He hoped that the United Nations would offer sufficient support to enable the Preparatory Commission to meet the deadline for the completion of its onerous task of elaborating, *inter alia*, the instruments concerning the Rules of Procedure and Evidence and the Elements of Crimes. He also hoped that the trust fund established to enable the least developed countries to participate in the Preparatory Commission would continue, together with the voluntary contributions to the fund and all other means of facilitating the Commission's work with a view to the timely completion of its work.

23. **Mr. Zellweger** (Observer for Switzerland) said that the Rome Statute was one of the most important developments in international law in modern times. Although not without shortcomings, it provided an extraordinary opportunity to deal with those responsible for the most serious international crimes. His delegation was determined to work for its implementation and, in particular, to safeguard its integrity. Of course, some clarifications remained to be made and some lacunae rectified. It would, however, be a mistake to reopen discussions held at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court or to attempt to restore ideas that had already been rejected. It was the task of the Preparatory Commission to reinforce the positive results of the Conference. His delegation was gratified that that view was shared by most of the States participating in the Commission.

24. With regard to the Elements of Crimes, his delegation was, on the whole, satisfied with the progress made. It welcomed the spirit of compromise and cooperation that had reigned, giving rise to the hope that the remaining obstacles could be cleared with equal ease. The final agreement on Elements of Crimes could not, and should not, however, be the cause of, or pretext for, weakening humanitarian law in any way.

25. With regard to Rules of Procedure and Evidence, his delegation welcomed the considerable progress made, particularly in the important areas of the protection of both victims and witnesses. There had been a clear wish to formulate precise and complete rules, but it was not for the Preparatory Commission to produce a complete code of procedure: the Rome Statute was already too detailed. It would be more appropriate to complement the Statute by a subsidiary Regulation, thus creating an instrument that would ease the difficult task of the future Court. The Commission must concentrate on the essentials. The deadline of 30 June 2000 was approaching fast. The Commission could not in any case foresee all possible procedural eventualities and the Court's procedures would inevitably be different from those of internal legislations. It was therefore essential for it to have sufficiently flexible rules of procedure. If held in a straitjacket, it would not be able to function.

26. Enormous demands had been placed on the Commission by resolution F of the Conference. In addition to the Elements of Crimes and Rules of Procedure and Evidence, six other draft instruments were to be prepared before the entry into force of the Statute, which would take place soon, it was to be hoped. The fact that the Conference had not fixed a date for the six drafts did not mean that they were less important or easier to elaborate. For that reason, a timetable should be drawn up for the Commission's work after 30 June 2000 and work should start on the draft instruments as soon as possible. In particular, it was important that the funding of the Court should be clarified as soon as possible. Perhaps national parliaments could consider the matter during the process of ratification. Above all, it was imperative that the Court should be truly independent; that included independence of those who financed it. The financial basis of the Court should therefore be assured in the short and the long term.

27. Although the Court would enter into force after 60 ratifications, all States had the responsibility to ratify if the Court was to be universal. Nor should ratification be taken lightly: safeguarding the integrity of the Statute also meant taking seriously the principle of complementarity. The establishment of the Court would not relieve States of their legal obligations arising out of international humanitarian law to prevent or prosecute international crimes. Moreover, in order to fulfil their obligations under the Statute, States could be called on to change their domestic legislation. His delegation therefore believed that it was important not only that the 60-ratification threshold should be crossed but that all ratifications should be accompanied by the necessary domestic adaptations. Only then could the Court function in accordance with the Statute.

The meeting rose at 4.25 p.m.